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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94 - 1939

STATE OF SOUTH CAROLINA,

PETITIONER,

v.

JAMES DONALD FOSSICK,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent James Donald Fossick respectfully requests that the Court deny the petition for a writ of certiorari sought in this case.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct with respect to the procedural history of the case, with one significant exception. Contrary to petitioner's summary of respondent's argument on appeal to the Supreme Court of South Carolina from the denial of post-conviction relief, respondent asserted in support of his claim of ineffective assistance of counsel that the solicitor's argument impermissibly impugned

respondent's exercise of fundamental rights other than the privilege against self-incrimination. The Supreme Court of South Carolina, citing its own precedent, held (1) that the argument was an impermissible comment on the defendant's right to plead not guilty; (2) that trial counsel was ineffective in failing to object to the improper argument; and (3) that respondent was entitled to a new trial because there was a reasonable probability that the omission affected the outcome of the trial. Appendix B at A-48 to A-49.

The following is a counterstatement of the facts.

On May 11, 1985, the Saturday before Mother's Day, Marilee "Lee" Whitten went missing. A gas station employee remembered seeing Whitten twice on May 11th: once between 8:00 and 8:30 a.m. and again between 1:00 and 1:30 p.m. On Wednesday morning, May 15th, Whitten's body was discovered in a wooded area of lower Richland County, nude except for socks. She had died of a head injury caused by a "large, heavy object," type unknown. A pathologist testified that the body had been there at least two days; she could not testify with more certainty about the length of time because the weather had been extremely hot in the days immediately before the body was found. R.p.13, lines 8-15; R.p.87, line 22-p.88, line 13; R.p.93, line 7-p.95, line 9; R.p.138, line 9-p. 140, line 4; R.p. 175, line 24-p. 176, line 23; R.p.178, lines 13-22.

Whitten had worked as a groomer's assistant at a local veterinary clinic. Respondent and Shane Parker worked there also,

but in different areas. Whitten finished work at approximately 1:10 p.m. on May 11th. Parker and respondent had finished work at the same time. Parker and respondent were both questioned about the case immediately after Whitten's body was found. Parker stated that, on May 11th at approximately 1:30 p.m., he had seen respondent and Whitten talking to each other from their respective cars, at an intersection near where the body was ultimately discovered.[1] Shortly after 2:00 that same afternoon, Parker called Whitten's home, but she was not there. He lied to her mother about when he had last seen Whitten. Parker called Whitten's home again that night. Parker and Whitten had flirted at work and had exchanged telephone numbers. R.p. 96, line 5-p. 105, line 25; R.p. 118, line 4-p. 121, line 10; R.p.202, line 21-p.203, line 11; R.p.207, line 4-p.208, line 6; R.p.315, lines 17-18.

David "Andy" Anderson gave a statement to investigators on Saturday, May 18th. He reported that he had seen respondent at a restaurant in Woodhill Mall between 2:15 and 2:45 p.m. on May 11th. After Anderson finished his meal and got in his car, he saw respondent drive through the mall parking lot. Anderson then took a friend home and went to his own house, and from there to work. He got to work at 3:15 p.m. Anderson believed he had seen respondent at the mall approximately 30 minutes before he got to

---

[1]Contrary to petitioner's characterization of Parker's testimony, he did not expressly testify that he had seen respondent at the window of Whitten's car. See R.p.101, line 13-p.103, line 19.

work. At trial, Anderson testified that respondent had approached him at school and asked him to be a witness to his whereabouts on May 11th. This happened either Wednesday, May 15th, or Thursday, May 16th. R.p.323, line 13-p.332, line 3. Contrary to the factual representation in the State's petition to this Court, there is no evidence that the request was made by respondent **before** Whitten's body was found. See R.p.329, line 8-p.331, line 12.

Brian Simons talked with respondent in a nearby Piggly Wiggly grocery store parking lot at 2:15 or 2:30 p.m. on May 11th. At 2:45, respondent and Simons drove separately to an animal shelter, where respondent hoped to find a dog to give his mother for Mother's Day. The shelter was closed; when their pleas for admission were unsuccessful, they left. Simons estimated the time was 3:05 p.m. Respondent arrived at his parents' home between 3:30 and 3:45 p.m. He played basketball at a neighbor's house between 4:15 and 6:00, then spent the rest of the evening at home. R.p.333, line 16-p.345, line 19; R.p.349, line 9-p.352, line 12; R.p.363, line 4-p.366, line 10; R.p.372, line 24-p.373, line 6.

The case languished until September 4, 1984, when investigators again interviewed respondent. He was 17 years old. He had no lawyer present at the interview. Respondent gave an alibi. The investigating officers told him they knew he had killed Whitten. The officers offered him psychological counseling. They talked about capital murder and the electric chair. The officers told respondent they would speak in his favor if he confessed. Ultimately, respondent signed a statement that began: "I've been

wanting to come so long and turn myself in." Respondent stated that he had struck Whitten in the head with an urn, dragged her some distance and left her naked in the woods. Respondent described the victim as lying "flat on her back with her legs slightly spread and an arm over her stomach." He further stated that he had transported Whitten to the wooded area in the trunk of his car and that she had scratched him and bitten him on the arm before he killed her. After signing the statement, respondent directed investigators to the site where the urn had been disposed of and pointed it out. The site was approximately one mile from where the victim's body was discovered. R.p. 18, line 11-p. 19, line 21; R.p. 23, lines 1-p. 30, line 14; R.p. 38, line 4-p. 52, line 8; R.p. 161, line 16-p. 162, line 2; R.p. 238, line 5-p. 243, line 1.

Petitioner asserts that respondent showed law enforcement officers a scar on his arm caused by the victim's bite; however, the testifying officer described the marks as "old bruises." R.p.241, lines 18-22. This was nearly four months after the incident. R.p.248, line 20-p.249, line 5. Respondent was wearing faded blue jeans and a light colored tank top or T-shirt on May 11th; yet, no one who saw him that afternoon observed any blood, bites or scratch marks on his arms or clothing. R.p.326, lines 1-8; R.p.338, lines 8-9; R.p.350, lines 2-8; R.p.363, lines 21-25; R.p.366, lines 5-8.

Moreover, petitioner's assertion that law enforcement officers reported that respondent did not appear upset or show any emotion

when he confessed or when he saw the urn is inaccurate. The investigator to whom respondent gave the confession acknowledged, "There was a redness in his eyes. He did make some statements about he felt better and that kind of thing." R.p.264, lines 14-23. Although he described respondent as calm, the officer who accompanied respondent to the site where the urn was found testified that respondent "brought up the fact that he sure felt better" after pointing out the urn. R.p.290, line 8-p.292, line 6.

There was no physical evidence identifying respondent as the perpetrator. Respondent had consented to submit to a head and pubic hair search on May 20, 1985. However, investigators were unable to find any hairs or fibers belonging to respondent on the victim. Nor did they find the victim's hairs, fibers or blood in the trunk of respondent's car or on the urn. No identifiable fingerprints were found on the victim's car. At 18 pounds, the urn was unwieldy for any but the very well coordinated. Significantly, the victim's body was in a different position than respondent described: her legs were spread widely apart, not slightly apart, and her arm was not over her stomach. R.p.141, lines 2-23; R.p. 163, line 2-p. 166, line 23; R.p. 170, line 18-p. 172, line 12.

On the other hand, there was independent evidence to support respondent's alibi defense. Mary Bushell lived at the intersection where Parker claimed to have seen respondent talking to Whitten at 1:30 p.m. on May 11th; the road was visible from her bedroom window. Between 1:00 and 2:30 p.m. on the day in question, Bushell saw three cars parked outside her window. Bushell testified that

a woman similar to Whitten and a man similar to Parker were among the four persons present. The woman was sitting in a yellow car. Parker's car was there; it left first. Bushell did not see either respondent or his car at that time. R.p.390, line 8-p.401, line 17.

Between 3:30 and 4:15 p.m. on May 11th, Boy Scout master Vernon Ketten saw Whitten's car being driven in the neighborhood where her body was later found. He remembered it because of a distinctive bumper sticker. Although he could not see the driver's face, her hair was the same color and length as Whitten's. There was a male passenger in the front seat. R.p.402, line 25-p.406, line 13.

At trial respondent repudiated his custodial statement. He testified that he left work at 1:10 p.m. on May 11th. Parker and Whitten were talking together in the parking lot; Parker offered respondent some marijuana resin, but he declined. Leaving them in the parking lot, respondent ran a series of errands. He estimated that he arrived at the Richway store at Woodhill Mall at 1:20, where he spent about half an hour. He spotted Andy Anderson at a mall restaurant as he walked to another store about 2:00 and left the mall in his car some 15 minutes later. He got gas; on his way to the animal shelter he met Brian Simons and pulled into the Piggly Wiggly parking lot at approximately 2:45. Respondent and Brian arrived in separate cars at the animal shelter about 3:15. They stayed some five minutes, looking at dogs through the fence, then parted ways. After a five-minute stop at a second animal

shelter, respondent returned to his parents' home between 3:30 and 3:45 p.m. He left to play basketball and came home in time for supper. He did not go out that night. The next night Parker called respondent, told him he had killed Whitten with some kind of tire tool and asked respondent to cover up for him. When investigating officers interviewed him later, respondent first told them the truth, then changed his story. He was afraid of the officers: they told him they knew he had killed Whitten and threatened him with the electric chair. At the same time he thought they were offering him help and a way out for both himself and Parker. He wanted to help Parker out. For these reasons, he complied with their request to give a confession. R.p. 411, line 7-p. 452, line 22; see R.p.122, line 24-p.126, line 10.

The solicitor cross-examined respondent as follows:

> Q How did you feel knowing that she was laying out there for all those days?
>
> A I didn't know she was out there.
>
> Q It didn't bother you?
>
> A I didn't even know she was out there. How can it bother me?
>
> Q It didn't bother your conscience?
>
> A I didn't even know she was out there.

R.p.476, lines 11-18 (emphasis added).

In his closing argument, the solicitor made the following remarks:

> It took [respondent] 28 minutes and 37 seconds. That's all it took him, 28 minutes and 37 seconds. He's got no remorse, no tears. He has got nothing, nothing. He wants you to be duped. He wants you to go back and say,

"We've got Nazis on our Sheriff's Department that are going out and beating and forcing confessions out of people." Now, really, really.

He met with them on four or five occasions and wouldn't give a confession. Finally, when they had him [sic] nailed him down to every minute of the day, faced him with it, he told them, "That's the way it happened. That's the way it happened."

* * *

You know, the innocent, they have a right to a jury trial and so do the guilty. Everybody that puts their hand on this Bible, they don't tell the truth. If they did, we certainly wouldn't need jurors. You go back and weigh out the logic and you weigh out whether or not this confession is true and accurate. It fits like a glove again. Go back and vote guilty and come back in here and tell people like [respondent], without remorse, without feeling, without anything, that "We aren't going to tolerate it here in our County." Thank you.

R.p. 535, line 19-p.536, line 5; R.p. 536, lines 14-24 (emphasis added). And with that, closing arguments ended.

SUMMARY OF THE ARGUMENT

In granting respondent a new trial, the Supreme Court of South Carolina relied on its own caselaw as precedent. Because reliance on federal law is not apparent on the face of the opinion, the writ should be denied for lack of jurisdiction. Under any analysis, the solicitor's remarks violated fundamental rights and prejudicially affected the outcome of the trial. Petitioner has failed to establish that the state court's decision incorrectly applies federal law.

ARGUMENT

I. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY HELD THAT THE SOLICITOR'S CLOSING ARGUMENT WAS AN IMPERMISSIBLE COMMENT ON THE EXERCISE OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Petitioner asserts that respondent was not denied effective assistance of counsel when his trial attorney failed to object to the solicitor's closing argument regarding lack of remorse. Petitioner contends that the state court's decision in this case is contrary to this Court's interpretation of the Fifth Amendment privilege against self-incrimination. Petition at 25-32. Rather, petitioner characterizes the argument as proper comment on the evidence. Petition at 32-35. In making these assertions, petitioner has overlooked critical points of law and fact.

A. This Court lacks jurisdiction to review the state court's decision, which does not rely on federal law.

The decision of the Supreme Court of South Carolina in this case was rendered under state law. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), is the sole authority cited for the conclusion petitioner challenges. See Appendix B at A-48 to A-49. Because reliance on federal law does not appear on the face of the opinion, the writ should be denied for lack of jurisdiction. Michigan v. Long, 463 U.S. 1032 (1983).

B. Petitioner's reliance on this Court's interpretations of Fifth Amendment right to remain silent is misplaced.

Respondent signed a waiver of rights, including the privilege against self-incrimination, each time he was interviewed by law enforcement officers before his arrest. The state relied on the last of these statements, a confession, and the accompanying waiver

of rights to prove respondent's guilt.

Waiving his privilege once again, respondent took the witness stand at trial. He testified that his confession was a lie, motivated in part by his promise to cover for Shane Parker and induced in part by the officers' threats and promises. The prosecution's case included evidence of these threats and promises. By waiving the Fifth Amendment privilege at trial, respondent put in issue the voluntariness of the pretrial confession under the due process clause of the Fourteenth Amendment. See Rogers v. Richmond, 365 U.S. 534 (1961).

At no time, however, did respondent just stand silent. Because silence per se was not the basis for the challenged remarks, petitioner's argument falls wide of the mark. The challenged remarks were in no sense a comment on, or use of, the accused's silence. Nor did the Supreme Court of South Carolina make such a finding. Therefore, in contradistinction to the cases cited by petitioner, there is no issue as to whether the solicitor's comment was a permissible or impermissible reference to the Fifth Amendment right to remain silent.[2]

One case cited by petitioner particularly merits discussion. In Jenkins v. Anderson, 447 U.S. 231 (1980), the defendant, charged with murder, testified that he acted in self-defense. The Court

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[2]The Fifth Amendment privilege against self-incrimination implies the right to plead not guilty and compel the state to establish guilt by independent evidence. See Malloy v. Hogan, 378 U.S. 1 (1964). Respondent exercised these derivative rights. Perhaps this is the source of petitioner's confused attempt to apply the Fifth Amendment in this case.

sanctioned the use of his prearrest silence for impeachment, on the grounds that its inconsistency with a later claim of excuse was probative, that it was not induced by governmental action, and that the privilege had been waived at trial. Neither Jenkins nor its underlying reasoning have any sway in this case. The solicitor did not remark on respondent's earlier silence, and respondent had waived no other right, opening the door to comment on its previous exercise. Moreover, neither petitioner's exercise of rights nor the lack of remorse with which the exercise was equated, is probative where the defense is outright innocence.[3] Absence of remorse is fully consistent with absence of guilt; therefore, it has no impeachment value.

C. There was ample evidence of remorse at the time respondent confessed to murder, nor was the solicitor's comment otherwise based on evidence adduced at trial.

A prosecutor may comment on the evidence and its reasonable inferences in summing up the state's case to the jury. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). The record in this case, however, fails to support petitioner's assertion that the solicitor's lack-of-remorse argument was a permissible comment on the evidence. Although respondent maintained his innocence from May until September 1985, the record reveals evidence of remorse or

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[3]Lack of remorse may be relevant to the issue of malice in a murder case. It may have some impeachment value where the accused admits committing homicide, for example, but claims legal provocation, justification or excuse. Even then, the absence of remorse must have an evidentiary basis. In such a case, as here, an argument that the accused lacks remorse merely because he elected to be tried by a jury, or to testify in his own defense, would violate due process.

repentance at the time respondent confessed, both in words and in appearance. His eyes were red. Respondent repeatedly stated that he felt better for confessing. Indeed, the confession itself begins, "I've been wanting to come so long and turn myself in." This sentence alone savors strongly of remorse.

Ironically, the contemporaneous expressions of remorse lent credence to the confession, which was the heart of the state's case. Had respondent exercised his right to remain silent at trial, had he not repudiated the confession at trial, the solicitor almost certainly would not have dared claim respondent was unpenitent.

But repudiate the confession he did, and it was the repudiation alone that triggered the solicitor's remarks. The wording of the argument points absolutely to respondent's assertion of rights as the basis for the "remorseless" characterization. Contrary to petitioner's assertion, this was not a permissible reference to respondent's demeanor during his trial testimony. Under South Carolina law, it is improper to "invite the jury to draw an adverse inference merely because the defendant did not appear penitent" where remorse would be irreconcilable with the defense.[4] State v. Johnson, 360 S.E.2d at 319.[5] More than

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[4]The inconsistency here is crystalized in the solicitor's cross-examination of respondent:

Q How did you feel knowing that she was laying out there for all those days?

A I didn't know she was out there.

Q It didn't bother you?

improper, it is fundamentally unfair. The solicitor expressly referred to respondent's election to be tried by a jury and to testify in his own defense and suggested that the choices themselves evidenced lack of remorse, and thus guilt.[6] This deprived respondent of a fair trial.

A I didn't even know she was out there. How can it bother me?

Q It didn't bother your conscience?

A I didn't even know she was out there.

R.p.476, lines 11-18 (emphasis added).

[5]This is a matter of state evidentiary law. Even if this Court finds that "the state court decided the case the way it did because it believed that federal law required it to do so," Michigan v. Long, 463 U.S. at 1041, this Court's contrary construction of the Constitution need not restrict state evidentiary law. Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980).

[6]The petition omits the most telling of the solicitor's remarks:

> You know, the innocent, they have a right to a jury trial and so do the guilty. Everybody that puts their hand on this Bible, they don't tell the truth. If they did, we certainly wouldn't need jurors. You go back and weigh out the logic and you weigh out whether or not this confession is true and accurate. It fits like a glove again. Go back and vote guilty and come back in here and tell people like [respondent], without remorse, without feeling, without anything, that "We aren't going to tolerate it here in our County." Thank you.

R.p. 536, lines 14-24 (emphasis added).

D. The solicitor's closing argument was an impermissible comment on the exercise of other rights secured by the Constitution, including the right to a jury trial and the right to testify in one's own defense.

The petition does not address the actual basis of the state court's decision, namely, that a comment on failure to express remorse violates rights other than the privilege against self-incrimination. On this issue, Griffin v. California, 380 U.S. 609 (1965), is instructive by analogy.

Indeed, the analogy is almost perfect. In Griffin, the accused exercised his right to remain silent at the guilt phase of his capital murder trial; the jury was instructed that his silence on any points he could reasonably be expected to deny or explain could be viewed as evidence of guilt. The Court ruled that the instruction violated the Fifth Amendment. Beyond that, the opinion suggests that the instruction was inherently unfair: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Thus, the instruction had a chilling effect on the assertion of the right, for an accused might reason that he should forego his privilege if it will only be used as evidence of guilt. See also United States v. Jackson, 390 U.S. 570 (1968) (federal antikidnapping law limiting to jury power to impose death sentence impermissibly discouraged exercise of rights to jury trial and to plead not guilty).

Similarly, here, respondent exercised virtually every fundamental right associated with a criminal proceeding except the right to remain silent. Respondent pleaded not guilty; he

required the State to prove his guilt beyond a reasonable doubt; he presented a defense; he testified in his own behalf, repudiating his earlier uncounseled confession. U.S. Const. amends. V, VI and XIV. The solicitor argued that respondent was guilty based on his earlier confession. Then he argued that, in exercising his right to a jury trial and in testifying as to his own innocence, respondent showed a lack of remorse. Thus, the solicitor, without justification, turned the very exercise of the accused's rights into further evidence of guilt. This is precisely what the Court found abhorent in Griffin.

As the state court held in this case, it was fundamentally unfair to permit an inference of guilt from nothing more than the exercise of rights that specifically designed to protect citizens from false conviction. Nothing in the exercise of these rights was inconsistent with respondent's defense. See Sorrells v. United States, 287 U.S. 435 (1932) (not guilty plea is not inconsistent with entrapment defense even though latter implies admission of offense); cf. Jenkins v. Anderson, supra. Nor is the inference of lack of remorse from the denial of guilt tolerable as an inevitable attribute of our system of criminal justice. Cf. Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (possibility of higher sentence on retrial does not impermissibly chill exercise of right to challenge first conviction by direct appeal or collateral attack).

Constitutional justification of such an argument is impossible. In asserting that the defendant is guilty and that he is simply without remorse if he claims otherwise, the prosecution

trivializes, even invades, the jury's role as finder of fact and arbiter of credibility. Such an argument belittles the presumption of innocence and mocks the right to present a defense. It diminishes the state's burden of proof.

In sum, the solicitor's argument was impermissible under the United States Constitution as well as under state law.

II. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY HELD THAT THE SOLICITOR'S CLOSING ARGUMENT WAS SO PREJUDICIAL THAT DEFENSE COUNSEL'S FAILURE TO OBJECT DEPRIVED RESPONDENT OF EFFECTIVE ASSISTANCE OF COUNSEL.

The Supreme Court of South Carolina, finding that the solicitor's closing argument was objectionable, held that respondent was denied effective assistance of counsel because defense counsel failed to object. Appendix B at A-49. The state court further held that there was a reasonable probability that counsel's deficiency affected the outcome of the trial. Id. Petitioner asserts that the comments were insignificant, that there is strong evidence of respondent's guilt, and that respondent's trial was therefore a fair one. Petition at 35-40. The record, however, supports the state court's holding.

The remarks concerning lack of remorse were no mere passing references. The solicitor had the last argument, and the remarks came at the very end of that argument, giving them heightened emphasis. Indeed, the very last thing the jury heard from the advocates in this trial was the solicitor's equation of lack of remorse with respondent's choice to be tried by a jury and to testify in his own defense.

In that testimony respondent repudiated a pretrial confession, putting its veracity at issue. He testified to his whereabouts on May 11, 1985, in support of his alibi defense. Petitioner, asserting that the record shows that respondent was the last person to be seen with the victim in the vicinity where her body was later found, overlooks contradictory evidence. Petition at 38. Respondent testified that he did not see the victim again after he left work at 1:10 p.m. A witness to the supposed later meeting between respondent and the victim could not place respondent at the scene; another witness saw the victim's car with a driver similar to the victim at a time when other witnesses testified respondent was with them. Contrary to petitioner's further assertion, respondent fully accounted for his whereabouts throughout the day. The fact that he met no one he knew as he shopped for 30 minutes or more in a mall store in a large metropolitan area is hardly surprising. It is certainly not strong evidence of guilt. Completely unfounded is petitioner's assertion that respondent asked a witness to go to court for him before the victim's body was found. Petition at 39.

Without any independent physical evidence to link respondent to the crime, the state relied heavily on the repudiated confession. Althought the confession was consistent with the physical evidence, there was nothing conclusive about the match. On the other hand, what physical evidence there was allowed substantial room for fabrication, as respondent's testimony showed.

In sum, the solicitor's references to a lack of remorse

implied in the exercise of fundamental rights violated those rights and so were impermissible. Cf. Donnelly v. DeCristoforo, 466 U.S. 637 (1984) (petitioner made no argument that remarks prejudiced a specific right so as to amount to a denial of that right). Respondent established that he was deprived of effective assistance of counsel when his trial attorney failed to object during closing argument. Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); see Strickland v. Washington, 466 U.S. 668 (1984). Moreover, there was at least a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992). Therefore, the Supreme Court of South Carolina properly held that a new trial was warranted.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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June 26, 1995

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June 26, 1995

Honorable William K. Suter
Clerk, U.S. Supreme Court
1 First Street, N.E.
Washington, DC 20543

Re: State v. James Donald Fossick

Dear Mr. Suter:

Enclosed you will find for filing, with proof of service, the original and ten (10) copies of the motion for leave to proceed in forma pauperis with affidavit along with a brief in opposition to the petition for a writ of certiorari in the above case.

Yours sincerely,

M. Anne Pearce
Assistant Appellate Defender

MAP/met

Enclosures

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

JAMES DONALD FOSSICK,

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that a copy of the motion for leave to proceed in forma pauperis along with affidavit and brief in opposition to the petition for a writ of certiorari in this case has been served upon Donald J. Zelenka, Esq., Assistant Deputy Attorney General, PO Box 11330, Columbia, SC 29211, this 26th day of June, 1995.

M. ANNE PEARCE
Assistant Appellate Defender

Sworn to and subscribed before me
this 26th day of June, 1995.

L.S.
Notary Public for South Carolina

My Commission Expires My Commission Expires October 21, 1996

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